No. 4496.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alexander B. Stewart, et al.,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, UNITED STATES OF AMERICA.

SAMUEL W. MCNABB,
United States Attorney,
MARK L. HERRON,
Special Assistant U. S. Attorney.

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I.

The Indictment.

The plaintiff in error, Alexander B. Stewart, hereinafter called the defendant, was indicted June 13, 1924, together with several other defendants. The indictment contained four counts: The first count charging conspiracy to violate Section 3 of Title II of the National Prohibition Act and Section 593 of the Tariff Act of 1922; the second, charging a direct violation of Section 593 of the Tariff Act of 1922;

the third, a direct violation of certain other provisions of the Tariff Act of 1922; the fourth, a conspiracy to violate Section 3, Title II of the National Prohibition Act. Defendant was found not guilty of the offenses charged in counts one and four and guilty of those charged in two and three.

II.

Statement of Facts.

Summarized briefly, the record shows that on the morning of March 22, 1923, about 365 gallons of whiskey, 45 gallons of brandy, 15 gallons of vermouth, 24 gallons of gin, 24 gallons of benedictine and 15 gallons of champagne were landed on the wharf of the Curtis Corporation of Long Beach, California, of which corporation the defendant Alexander B. Stewart was president.

That this liquor was unloaded from a fishing vessel, the "Nagai", upon which it had been transported from the mother-ship "Borealis" then lying near the Anacapa Islands. That this liquor so unloaded, with the exception of five cases, which were placed with the knowledge of defendant, Stewart, in Stewart's automobile, was loaded into two trucks; that when the loading had been completed, the defendant Stewart drove his car containing the said five cases of liquor out from the yard of the Curtis Corporation for the purpose of conveying the liquor to his home, was stopped, placed under arrest and the plant of the Curtis Corporation raided by police officers and the persons found there placed under arrest.

Upon the trial defendant Stewart testified as a witness upon his own behalf and stated in part that on the afternoon of March 21, 1922, he saw Frank Kubota, one of the co-defendants indicted jointly with Stewart; that Kubota stated he had a friend bringing a load of liquor into the harbor that night and wanted to use the docks of the Curtis plant to unload it; that he, Stewart, refused to permit this to be done; that that evening just as he was retiring, he received a telephone call from Kubota, who stated that he had a boat that wanted to drop a net and that he, Kubota, wanted to see Stewart down there; that he immediately went to the dock and saw a boat alongside thereof, from which two Japanese were unloading liquor, there being at that time several cases on the dock; that he protested but at the same time did not want to offend Kubota, as he was a leader among the Japanese, upon whom the Curtis cannery was dependent for its supply of fish, and in consequence feared to report the occurrence to the authorities; that he therefore told Kubota to get the stuff away as quickly as he could, and said substantially the same thing to a white man giving the name of Morris, who appeared to be in charge of the landing operations.

That on one of his trips to the dock to investigate the progress of the loading of the trucks, one of the men stated he wanted to give Stewart some liquor as Stewart "had been decent with them"; that Stewart then got his automobile, which up to this time had been parked outside the yard of the Curtis

plant, and drove it into the yard to give the boys the "opportunity of putting into the machine the liquor" that they stated they wanted to "give him"; that upon returning from the dock the liquor had been placed in his car and that he had no agreement or understanding with any of the defendants that as a consideration for his permitting them to land the liquor, he should receive liquor, and was paid no money for so doing. [Tr. Rec. 213-219.]

Accepting this statement as true, disregarding the suspicious circumstance that Stewart, the president, Albert C. Leahy, the production manager and Victor C. Lord, general sales manager of the Curtis Corporation, were all at the plant at 2:00 a. m.; disregarding the fact that the night watchman was sent home about 10 o'clock in the evening, and his place taken by Lord, the general sales manager, circumstances strongly indicating foreknowledge on his part, it is obvious that defendant Stewart, was by his own testimony guilty of the offenses charged in the second and third count of the indictment.

III.

Specifications of Error Relied Upon.

That Stewart is guilty upon the merits is apparently conceded by defendant's brief, which without any consideration of the conviction upon its merits, urges upon this court for the first time that the conviction of the defendant was a nullity because of the alleged altering by the court, at Stewart's request, of the second and third counts of the indictment.

IV.

Circumstances of the Alleged Altering.

A

The indictment was returned and filed June 13, 1924; defendant Stewart entered his plea of not guilty on August 11, 1924; the cause came on for trial January 20, 1925; the jury was selected and sworn; and on January 21, 1925, the defendants filed a motion to strike from the indictment the words "feloniously and", the words "section 813" and the words 'the Tariff Act of 1922". [Tr. Rec. 43-47.] This document, *the written motion was signed by all of the counsel for defendants, including Geo. Spicer and C. W. Pendleton, counsel for defendant, Stewart.* The circumstances leading to the change in the indictment appear from the record as follows:

"By the Court: I think as to the two counts which charge a substantive violation of the Act and do not charge a conspiracy to violate the Act, that the motion will be granted.

Mr. Herron: The government has no objection."

The court having granted the motion, a line was drawn through the objectionable words *by counsel, not by the court,* and initialed by counsel both for the defense and for the government, the record showing:

"By the Court: I think gentleman, you had better take this indictment and make the changes by interlineation in accordance with the ruling." [Tr. Rec. 134.]

Position of the Government.

It is the position of the government that the granting of the motion of defendant Stewart, and the subsequent drawing by counsel of a line through the words objected to amounted to merely the abandonment or suppression of surplusage and not to an amendment of the indictment. A mere reading of the counts upon which defendant Stewart was convicted will establish the truth of this statement. Read with the words omitted, the indictment charges:

"* * * the defendants * * * did knowingly, willfully, unlawfully, and with the intent to defraud the revenues of the United States, smuggle, etc." [Tr. Rec. 23.]

Read with the words included, the indictment charges:

"* * * the defendants * * * did knowingly, willfully, unlawfully *and feloniously* and with intent to defraud the revenues of the United States, smuggle, etc."

Section 593 of the Tariff Act cited in the second and third counts of the indictment expressly declares the offenses therein denounced to be a misdemeanor. The use of the word "feloniously" did not and could not change the character or nature of the offense and therefore can only be surplusage. The defendant knew to the same extent before and after the granting of his motion what he was accused of. He was neither mislead nor prejudiced by it. Any defense under the indictment as it stood before the granting

of his motion was equally available after the motion was granted; any evidence he had was equally applicable to the indictment in the one form or the other; the transaction charged was not altered by the granting of the motion but remained precisely the same, as is evidenced by the fact that no necessity for a new or different plea was suggested by the defendant.

The fact that the defendant himself made the motion for the amendment and that he permitted himself, without objection, to be tried, and thus embraced the opportunity of possible aquittal; that he did not urge the granting of his motion as ground for a new trial upon his motion therefor, but on the contrary raised the point for the first time upon this appeal and did not expressly urge the objection even as one of the specifications of error herein relied upon demonstrates that the defendant did not feel an error had been committed, nor that he had suffered prejudice to his substantial rights by reason of the granting of the motion.

V.

Upon the Doctrine Claimed To Be Announced in the Bain Case, 121 U. S., 1, That Any Change Whatsoever Whether of Substance or of Form Made by the Court in an Indictment Destroys the Validity Thereof, and Divests the Court of Jurisdiction, Defendants Contend That the Counts of the Indictment Upon Which Stewart Was Convicted Were a Nullity.

An examination of the Bain case discloses that it is not applicable to the facts involved in the case at bar and does not sustain the position of the de-

fendant. In the Bain case the court struck from an indictment charging that the defendants and each of them "made said false statement and report in manner and form as above set forth with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association", "on motion of the United States by counsel" and "the Comptroller of the Currency and".

The Supreme Court in considering the effect of the amendment said:

> "While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be

> said that, with these words stricken out, it is the indictment which was found by the grand jury?"

The above statement by the court is tantamount to a finding that the words 'the Comptroller of the Currency and" might not, under the circumstances of that case, have been and probably were not surplusage, because it was "not impossible, nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive". In other words, the court found that the words stricken were material and might reasonably have been intended by the grand jury to express its matured decision as to the person whom the defendants purposed to deceive.

As a further distinction between the Bain case and the instant case, it should be noted that the motion requesting the amendment to the indictment in the Bain case was made "upon motion of the United States by counsel", while in the case at bar it was made by the defendant, without objection on the part of the government, and this court should be extremely reluctant, unless it is unmistakably convinced of the soundness of defendant's contention, to permit him to profit by his own invited error, if error it can be said to be.

The circumstances in the case at bar are not unlike the circumstances in Goto v. Lane, 265 U. S. 402, where the distinctive "or" was used in several instances in the indictment where the conjunctive "and"

doubtless should have been used. The defendants and their counsel stipulated in writing with the prosecuting officers that the indictment should be "considered and understood" as "reading in the conjunctive instead of the disjunctive". The judge endorsed his approval on the stipulation and it was filed in the cause, but no change was made in the indictment itself.

True, in the case at bar the indictment itself was changed by the hand of counsel for defendant and was initialed by both counsel for the defendant and the government but all of this was done at the solicitation of the defendant, the United States District Attorney, as stated in defendant's brief, "seconding" the motion.

In our opinion these acts amounted to nothing more or less than a stipulation between counsel for the respective parties, which was approved by the court, as in Goto v. Lane, *supra,* where it was said by the Supreme Court of the United States:

> "The purpose of the stipulation was not to alter or change the indictment, but to show that the parties construed and understood the accusation in a particular way, and desired the court to do the same. *Had the court done so without stipulation, that might have been an error in the exercise of jurisdiction, but it would not have worked an entire disability to proceed to a trial and judgment. And had the accused been acquitted, it hardly would be said that the acquittal was void. The stipulation did not alter the situation in these respects.*"

The above language was used by the Supreme Court in distinguishing the Bain case, upon which the petitioners in that case before the court, as in this, relied for reversal.

VI.

Assuming, as Claimed by the Defendant, That the Court Had No Power to Amend the Indictment by Striking the Words "Feloniously and" Therefrom, it Follows, it Seems to Us, That the Attempted Amendment Was Not Effectuated, but Was a Vain Act on the Part of the Court.

An act which a court has no power or authority to do, is a void act, and insofar as such an act attempts to command or permit a thing to be done, it is no act at all. The act of counsel in drawing a line through the words "feloniously and" and by that method attempting to eliminate said words from the indictment, amounts to the independent act of counsel, entirely devoid of judicial effect.

Conclusion.

The modern conception of our jurisprudence no longer favors reversal of causes upon technical errors not effecting substantial rights, and in this connection we respectfully call the court's attention to Section 269 of the Judicial Code, as amended February 26, 1919, which declares that:

> "On the hearing of an appeal * * * civil or criminal * * * the court shall give judgment after an examination of the entire record

> before the court, without regard to technical errors, defects, exceptions, which do not affect the substantial rights of the parties."

In view of the foregoing, can it be said that the defendant Stewart was deprived of the rights accorded every American citizen under the fifth amendment to the Constitution of the United States "not to be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury"?

Looking at the question in the light of the expression of Congress, contained in the language of Section 269 of the Judicial Code, and considering it from the standpoint of the modern tendency to more liberally interpret and apply our laws in order to effectuate substantial justice without regard to superficial or technical errors, we submit that an examination of the record will readily convince this court that that question must be answered in the negative and the judgment of the lower court sustained.

Dated March 5th, 1926.

SAMUEL W. MCNABB,
United States Attorney,
MARK L. HERRON,
Special Assistant U. S. Attorney.